



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Applied Construction Technology

File: B-251762

Date: May 4, 1993

Benjamin N. Thompson, Esq., for the protester.
Marilyn Walter Johnson, Esq., and Paul M. Fisher, Esq.,
Department of the Navy, for the agency.
Robert C. Arsenoff, Esq., and Glenn G. Wolcott, Esq., Office
of the General Counsel, GAO, participated in the preparation
of the decision.

DIGEST

Agency failure to solicit a small business concern known to
be interested in an unrestricted procurement violated
Federal Acquisition Regulation provisions governing
distribution of solicitation documents.

DECISION

Applied Construction Technology protests the failure of the
Department of the Navy to solicit Applied, a small business,
under invitation for bids (IFB) No. N62467-92-R-4928 for
base housing maintenance services at the Marine Corps
Logistics Base in Albany, Georgia.

We sustain the protest.

BACKGROUND

These services were initially advertised under IFB
No. N62467-92-R-4912 as a small disadvantaged business (SDB)
set-aside. On September 10, 1992, that IFB was canceled
after bid opening because Applied submitted the only
responsive bid,¹ and the contracting officer was unable to
determine the reasonableness of Applied's bid. See Federal
Acquisition Regulation (FAR) § 14.404-1(c)(6). On that
date, the Navy informed Applied in writing of the

¹A second bid was submitted, but subsequently withdrawn on
the basis of a mistake in the bid.

cancellation, indicated that it planned to conduct an unrestricted procurement, and specifically advised Applied that: "your interest in this solicitation is appreciated and your name will remain on our bidders list." (Emphasis added.) Applied subsequently filed a protest with this Office challenging the agency's cancellation of the restricted solicitation; we denied that protest on February 18, 1993. See Applied Constr. Tech., B-249565.2, Feb. 18, 1993, 93-1 CPD ¶ 154.

On September 18, the Navy synopsized its unrestricted procurement under the present IFB number in the Commerce Business Daily (CBD). The CBD synopsis required prospective offerors to request bid packages in writing and stated that the base period of contract performance would be 1 year, with three 1-year options. Applied did not read the September 18 CBD synopsis and, therefore, did not request a copy of the unrestricted IFB. Sixty-five firms responded to the CBD synopsis and these firms were placed on a new mailing list which the Navy created for the instant procurement; the record reflects that the unrestricted solicitation was distributed between October 5 and October 14, and that copies were sent only to the firms on the new mailing list.

The Navy states that "[a]lthough Applied did remain on the existing bidder's list which had been developed for the SDB solicitation, [that] bidder's list was not used for the unrestricted resolicitation." The Navy further explains:

"The offerors who responded to the CBD notice [for the unrestricted procurement] included many of the same SDB contractors who had requested copies of the previous [solicitation] Time constraints were a factor in many of the actions which were taken with respect to this procurement. . . . In an effort to avoid duplication of names and a time exhaustive comparison of both lists, the agency decided to send solicitations only to those firms who responded to the [CBD announcement for the unrestricted solicitation]"

By letter dated November 17, 1992, the Navy responded to Applied's first protest challenging the cancellation of the restricted procurement. Although, as noted above, the Navy had already issued and distributed the unrestricted solicitation (without sending a copy to Applied) and had established a bid opening date of November 19, the agency's November 17 response to Applied's protest made no mention of the fact that the unrestricted procurement was ongoing. Applied did not learn that the Navy requirements it was protesting had been resolicited until December 10.

Bids under the unrestricted IFB were opened on November 19. Ten bids were received and an award was made on November 24 to Satellite Services, Inc. in the amount of \$525,506.

DISCUSSION

As noted above, the Navy does not dispute that it failed to send Applied a copy of the solicitation for the unrestricted procurement. Nonetheless, the agency maintains that its failure to send Applied a solicitation was inadvertent, that it made a good faith effort to comply with the applicable statutory and regulatory requirements regarding notice and distribution of solicitation materials, and that it obtained adequate competition. On this basis, the Navy argues that Applied's protest should be denied.

The Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(a)(1)(A) (1988), requires contracting agencies to obtain full and open competition through the use of competition procedures, the dual purpose of which is to ensure that a procurement is open to all responsible sources and to provide the government with fair and reasonable prices. Davis Enters., B-249514, Dec. 4, 1993, 92-2 CPD ¶ 389. "Full and open competition" is obtained where all responsible sources are permitted to submit sealed bids or competitive proposals. See 10 U.S.C. § 2302(3); 41 U.S.C. § 403(b) (1988). In pursuit of these goals, it is a contracting agency's affirmative obligation to use reasonable methods as required by the FAR for the dissemination of solicitation documents to prospective contractors. Davis Enters., supra.

The FAR provides that solicitation mailing lists are to be maintained by contracting activities, that lists are to include those considered capable of filling agency requirements, and that solicitations are to be sent to those on the lists. FAR §§ 14.203-1, 14.205-1, 15.403. In addition, agencies are required to include all established and potential small business sources, such as Applied, on its mailing list and to send solicitations to those firms. FAR §§ 19.202-2(a), 19.202-4(c); Holiday Inn--Laurel, B-249673.2, Dec. 22, 1992, 92-2 CPD ¶ 428. The agency failed to satisfy these requirements and as a result failed to include Applied on the mailing list for this competition as it specifically told the protester it would. In our view, the Navy's desire to avoid the "time exhaustive comparison of both [mailing] lists" does not justify this failure. Further, the agency's assertion that "time

constraints" precluded it from consolidating the two bidders lists is inconsistent with its actual distribution of solicitations over a 9-day period from October 5 to October 14. The new mailing list contained 65 names; the mailing list generated under the restricted IFB contained 77 names. A comparison would have taken a relatively short period of time.

The Navy argues that Applied was not prejudiced by its action, noting that Applied's bid under the restricted procurement was considerably higher than the price of the winning bid in the unrestricted procurement. The Navy argues that even if Applied had been permitted to compete "it is unlikely that [its] price would have been competitive and in line for award." Applied disputes the Navy's position, characterizing the assertion as "at best, mere speculation."

We are unable to accept the Navy's conclusory presumption that, in spite of Applied's efforts to participate in the competition through this protest, the firm would not have submitted a competitive bid if it had been permitted to compete in the unrestricted procurement. The agency believes that Applied's pricing strategy would have been the same as the strategy it employed several months earlier during the procurement set aside for SDBs. We share Applied's view that its protest should not fail because of the agency's speculation about what Applied would have bid. For example, in preparing its bid for the earlier SDB procurement, Applied was obligated to base that bid on performing at least 50 percent of the contract with its own employees. See FAR § 52.219-14. Had Applied been permitted to participate in the unrestricted procurement, it would have been free--as were all other participating offerors--to submit a bid based on greater subcontractor participation. Further, it is reasonable to assume that a firm's bidding strategy would be different in an unrestricted competition than in a competition limited to SDBs.

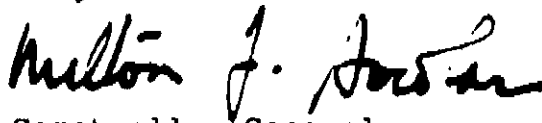
Where, as here, an agency has clearly violated an applicable procurement statute and regulation, the possibility that the protester might have received an award is a sufficient basis to sustain the protest. See Logitek, Inc.--Recon., B-238773.2; B-238773.3, Nov. 19, 1990, 90-2 CPD ¶ 401. Here, the Navy's speculation regarding the price Applied might have bid had it been permitted to participate in the unrestricted procurement is insufficient for us to conclusively determine that there was no possibility of

prejudice to Applied. See, e.g., Heritage Reporting Corp.-- Recon., B-240924.3, June 20, 1991, 91-1 CPD ¶ 584; Hamilton Enters., Inc., B-230736.6, Dec. 20, 1988, 88-2 CPD ¶ 604.²

The protest is sustained.

RECOMMENDATION

Since Applied's protest was not filed within 10 calendar days following contract award, the agency was not obligated to suspend contract performance pending resolution of the protest. See 31 U.S.C. § 3553 (1988). Thus, contract performance of the base year has continued for approximately 5 months. In light of this, we do not recommend that the contract be terminated and resolicited. Rather, we recommend that no contract options be exercised and that the requirements be resolicited for the option periods at a suitable time prior to the end of the base period of the contract. Applied is entitled to recover its costs of filing and pursuing the protest. 4 C.F.R. § 21.6(d) (1) (1993).



Acting Comptroller General
of the United States

²The Navy also argues that Applied was on constructive notice of the solicitation, since it was synopsized in the CBD on September 18. However, publication in the CBD is not sufficient notification to a small business that reasonably expects to be considered for the new contract and to receive a solicitation. Applied's reasonable expectation of being solicited derives not only from its status as a small business but from the fact that it participated in the prior, canceled procurement and that the Navy explicitly assured the firm, in writing, on September 10 that it would be solicited. See Davis Enters., *supra*.